

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Succession Cause 200 of 2001

IN THE MATTER OF THE ESTATE OF EPHANTUS KAMAU NDUATI (DECEASED)

STEPHEN KAMAU NDUATI.....APPLICANT

VERSUS

LYDIA NDUTA KAMAU.....RESPONDENT

JUDGMENT

This cause relates to the estate of **EPHANTUS KAMAU NDUATI** (the deceased) who died on 4th February 2000. On 14th May 2001 his eldest son, Stephen Nduati Kamau (the first Petitioner) presented a petition to this court for grant of letters of administration intestate. He named his mother and his siblings as the only beneficiaries of the deceased's estate. After objection was raised by Lydia Nduta Kamau, who claimed to be the second wife of the deceased, the first Petitioner conceded and together with the said Lydia Nduta Kamau they were appointed joint administrators of the estate of the deceased. The issue before me now is the sharing out of the deceased's only property situate at Elburgon and known as Elburgon/Arimi Ndoshwa Block 3/8. The parties consented to rely on the affidavit evidence and their counsel's written submissions.

In the affidavit of the first Petitioner and the submissions by his counsel it is contended that the deceased having on the 6th June 1959 married his first wife Bilha Wamaitha under the Marriage Act he was not capable of contracting another marriage and that the second Petitioner's contention that she was married to the deceased does not arise.

With due respect this submission has no merit. Having conceded to the second Petitioner being brought on board as one of the administrators of the deceased's estate, the issue of whether or not she was married to the deceased and therefore entitled with her children to inherit his estate does not arise. True, having contracted a civil marriage the deceased was not capable of contracting another civil marriage. But that was no bar to marrying a second wife under Kikuyu Customary Law. In the circumstances I find that the second Petitioner was indeed a wife of the deceased entitled with her children to inherit his estate.

The first Petitioner's further contention is that if I overrule him on the status of the second Petitioner, then I should find that together with her children she is only entitled to $\frac{3}{10}$ share of the estate piece of land. This is because according to the first Petitioner there are seven units from the first house and only three from the second. Included in the first house is the deceased's first wife Bilha Wamaitha and Mary Wairimu both of whom are deceased. He should have omitted his late mother's name and given John Gatukuro's in place of that of the late Mary Wairimu. I agree with the second Petitioner that the first Petitioner was dishonesty in including these two when they were already deceased.

The second Petitioner has been quite magnanimous in accepting that all the deceased's children, including the married daughters, should share in the estate. In the circumstances I hold that the deceased's estate shall be shared equally among all the heirs who are from the first house: Stephen Nduati Kamau, Samuel Njuguna Kamau, Simon Maina Kamau, Eunice Wanjiku Kamau, Julia Muthoni Kamau and John Gaturuko taking her late Mary Wairimu's share and from the second house: Lydia Nduta, Laurence Karanja Kamau and Fredrick Machanga Kamau. Each party shall bear its own costs.

DATED and delivered at Nakuru this 30th day of October 2008.

D. K. MARAGA

JUDGE.